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No. 02-1624

In The
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, SUPERINTENDENT,
Petitioners,

v.

MICHAEL A. NEWDOW,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The
Ninth Circuit

BRIEF OF *AMICUS CURIAE* ATHEIST LAW CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Atheist Law Center is a nonprofit corporation whose mission is educational and legal advocacy on behalf of citizens who espouse no religious belief. The Center is dedicated to securing and defending the constitutional rights of atheists. Its primary focus is working to assure governmental neutrality toward religion.

The Center has an interest in defending the principle often articulated by this Court that the state may not favor religion over irreligion. It believes that the Court would deviate from this principle were it to apply a "ceremonial deism" rationale in this case, for such reasoning inescapably confers a place of privilege on religious citizens in our diverse polity and renders atheists "outsiders" in the political community. The Center believes that the words "under God" in the Pledge are manifestly religious and that under this Court's principled holdings, they cannot stand in the school context. It offers this brief because this case presents a danger of deviation from the cherished principle that atheists–people who espouse no religion and claim no sect at all–are "constitutional people" entitled to First Amendment protections.

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[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amicus curiae* and its counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk. Counsel of record is not affiliated with the Atheist Law Center; secondary counsel is its executive director.

SUMMARY OF THE ARGUMENT

This Court's precedents are not apothegms and counsel to be taken or ignored at the option of the polity or lower courts. This Court has been particularly scrupulous in protecting religious liberty and the right to dissent from state attempts to prescribe orthodoxy in the public schools. This Court has also been firm, clear, and true to the principles animating the First Amendment in affirming time and again that the state may not take action that makes religion relevant to a citizen's status in the political community–including actions that telegraph the message that religious citizens are privileged over irreligious ones. No appeal to a rule of convenience, whether termed an appeal to history, ubiquity, or "ceremonial deism," and no artfully crafted arguments based on distinctions, denials, or textual construction, can justify departure from these precedents and the principles on which they stand. No principled distinction of this Court's precedents could be or has been offered that could immunize a pledge that requires affirmation of belief in deity and symbolically unites the state with religion.

ARGUMENT

I. THE FIRST PRINCIPLE OF THE BILL OF RIGHTS IS FREEDOM OF HEART AND MIND, A PRINCIPLE OF HEIGHTENED IMPORTANCE IN THE PUBLIC SCHOOLS.

Precedents are not mere outcomes in cases but

subsume the principles that animate those outcomes. "[W]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result," "its well-established rationale[s]," that bind this Court, lower courts, and the polity. *Seminole Tribe v. Florida*, 517 U.S. 44, 66, 67 (1996). Disregard of the reasoning process that generates legal rules is a triumph of reductionism which ultimately subverts the rule of law; if each case is merely a set of unique and unrepeatable facts, there can be no determinacy or continuity in the law.[2] Any other view of this Court's precedents reduces them to occasional dispensations of constitutional pablum, platitudes that are invoked ritualistically by lower courts even as they blithely disregard the command of those same rulings. The Ninth Circuit's decision in *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003), did not distinguish controlling precedents out of existence in order to reach a politically popular result, and did not reach for scattered *dicta* in inapposite cases to justify deviation from principles this Court has articulated for half a century. Its faithful application of this Court's precedents should be

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[2] *See* K. Llewellyn, *The Bramble Bush* 72 (1960). Restricting the compass of precedent to a radius so narrow that it reaches only fact patterns in Case 2 that are identical to those of Case 1 constricts the notion of "principle" upon which the notion of "precedent" depends: "This rule holds only of redheaded Walpoles in pale magenta Buick cars." Since the Court's cases generally involve transcendent principles, "redheaded Walpole" cases are rare; *amicus* respectfully suggests that *Marsh v. Chambers*, 463 U.S. 783 (1983), and ceremonial deism references, discussed *infra*, might be just such rarities.

affirmed.

Petitioners, however, do not want this Court to be faithful to precedents or to principle in deciding this case. In its startlingly candid brief, Petitioners' *amicus* The Rutherford Institute explicitly urges the Court to repudiate its *precedents* in order to embrace its *dicta* as controlling law. (Br. of *Amicus Curiae* Rutherford Institute at 5, 9.) The Rutherford Institute bluntly notes the "conflict between the Court's Establishment Clause dicta and its holdings" (*id.* at 9), conceding that the Ninth Circuit "straightforwardly" applied this Court's precedents. (*Id.*).

Amicus Atheist Law Center here concurs in the observation that there is plain conflict between the Court's holdings and its *dicta* on "ceremonial deism" but urges the Court to affirm its clear precedents – and the Ninth Circuit – rather than to elevate aphorisms in a few of its opinions to the status of controlling authority. Indeed, *amicus* agrees with the Rutherford Institute that, in order to reverse the Ninth Circuit in its straightforward adherence to this Court's precedents, the Court would have to "resort to definitional niceties." (*See id.*) The Rutherford Institute asks this Court to stand on principle, although the principles it asks this Court to adopt it frankly acknowledges to be ones the Court has never adopted; it boldly asks the Court to "reconstitute its Establishment tests" by "repudiat[ing]" its precedents in order to "permit official recognition" of "the Divine origin of the rights of humanity." (*Id.* at 2, 10.) For, in the Rutherford Institute's words, if this Court applies its actual precedents, "why should state-sponsored recitation of the Pledge not be struck down as an impermissible preference for religion

over nonreligion?" and "[o]n what principled ground, . . . can it survive constitutional scrutiny, as long as such scrutiny is defined" by this Court's precedents? (*Id.* at 9.)

Amicus Atheist Law Center asks the Court to stand on principles it has adopted as precedents – principles governing compelled affirmations and state-endorsed religious activity in public schools – as well as the constitutional protection extended to nonbelievers. Straightforward application of precedent will require neither judicial fiat, nor reductionism, nor semantical acrobatics.

None of this Court's actual holdings, or the reasoning animating them, accredits anything like the compulsory religious affirmation at issue here. The Rutherford Institute acknowledges that the Court cannot "reconcile the Pledge with its understanding of the Constitution," and that to do so, it would be obliged to "disavow" its school-setting and irreligion-protective precedents. (*See id.* at 10.) Alone among the briefs urging reversal, the Rutherford Institute's can be credited with eschewing artifice to pronounce the blunt truth: the phrase "under God" is "undeniably religious in nature" if the words have any meaning at all. (*Id.* at 9-10.)

Amicus Atheist Law Center agrees that the Pledge cannot be sustained in the school context on a "principled ground" if this Court's words have meaning (*id.* at 9), and that resort to "definitional niceties" (*id.*) is no substitute for principle. This case brings starkly home a bedrock principle which officials are often all too willing to sacrifice for the comfort of perceived social cohesion, or in service of some ideal homogeneous "way of life":

> The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures–Boards of Education not excepted .... That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

This Court's cases for the last half century have recognized that governmental alliance with religion can inject divisiveness detrimental to the social good and antithetical to constitutional guarantees of freedom of conscience. In *Everson v. Board of Education*, this Court underpinned its holding with the observation, "The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political power and religious superiority." 330 U.S. 1, 8-9 (1947). It has since made plain that it is not only *sectarian* alliance with government that the Establishment Clause proscribes, but also governmental alliance with religion generally. *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) ("[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority"); *id.* at 52 ("[T]he individual freedom of conscience protected by the First

Amendment embraces the right to select any religious faith or none at all"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973); *Torcaso v. Watkins*, 367 U.S. 488, 491 (1961).

The Court has distilled various proscriptions on majoritarian compulsion and religious promotion into a central command: the state may not, through endorsement of religion, "send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).[3] Atheists cannot be made strangers to the First Amendment's protections.

In this case, the "political community" is the only one known to schoolchildren: the schoolhouse. In this venue, the Court has been particularly solicitous of the principle of religious neutrality: "'[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Epperson v. Arkansas*, 493 U.S. 907 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). The Court has carefully defined "willingnessness" to participate in a group religious affirmation or exercise in this controlled and prescriptive environment, recognizing that it affronts the very idea of separation of church and state to enforce

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[3] As Justice Blackmun noted in *County of Allegheny v. ACLU*, this now-familiar formulation refines and amplifies, rather than supplants, the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 621 (1971). *See* 492 U.S. 573, 592-97 (1989).

compulsory school-attendance laws and then subject schoolchildren to religious indoctrination there. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

This Court's principles trump its *dicta*. Thus, even if this Court has stated in *dicta* that prayer is part of "our spiritual heritage," a public school may not require or encourage students to recite a prayer even if the recitation is, in a formalistic sense, "voluntary." *Engel v. Vitale*, 370 U.S. 421, 425 (1962). Even if this Court has stated in *dicta* that the Bible has an "exalted" place in our society, it has nonetheless held that the vocal reading of Bible passages as an organized classroom activity–even if "voluntary" in a formalistic sense–is unconstitutional. *Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963). Even if the Ten Commandments have been characterized as "the fundamental legal code of Western Civilization," this Court has nonetheless held that their unadorned posting on classroom walls, even if the expense is borne by private parties, violates the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

The Court's vigilance in the public-school context is explained both by the susceptibility of young minds to religious coercion and by the unique role the public schools play in a country extraordinarily diverse in religious perspectives:

> It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort–an

> atmosphere in which children may assimilate a heritage common to all American groups and religions. . . . [T]his is a heritage neither theistic nor atheistic, but simply civic and patriotic.

Schempp, 374 U.S. at 241-42 (Brennan, J., concurring) (internal citations omitted; emphasis in original).

The Court's concern with the inherently coercive environment in which schoolchildren find themselves has been a hallmark of Establishment Clause jurisprudence. In striking prayer at school-sponsored graduations even though attendance at the commencement ceremony was not required for conferral of the diploma, this Court found that the prayers induced young objectors to conform and concluded, "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise." *Lee v. Weisman*, 505 U.S. 577, 599 (1992). The Court found the excuse that attendance at commencement was voluntary "lack[ing] all persuasion" and "formalistic in the extreme," *id.* at 593, and concluded, "The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." *Id.* at 596. The Court has likewise rejected the excuse that a dissenter may simply absent himself for the duration of the exercise: "'[T]he availability of excusal or exemption simply has no relevance to the establishment question.'" *Nyquist*, 413 U.S. at 786 (quoting *Schempp*, 374 U.S. at 288).

Regardless of Petitioners' and some of their *amici*'s attempts to distinguish or evade entirely these precedents,

these precedents control and already have defined the nature of "willing" participation in religious rites and recitations in the public schools.

It cannot be the case, because it would be unprincipled, that the state which may not post the Ten Commandments in the classroom, a religious promotion which requires no participation by students, may oblige "willing" students to utter the creed that the nation exists "under God." Invoking "willingness" in that context would be "formalistic in the extreme." *Stone v. Graham* was decided as it was not because the Ten Commandments are sectarian in the iterations of various denominations, but because they are *religious*: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents… ." *Stone*, 449 U.S. at 41-42..

Nor can it be the case, because it would be unprincipled, that the state which may not sponsor prayers at school-sponsored events (let alone in the classroom) may nevertheless oblige "willing" students to utter the creed that the nation exists "under God." Invoking "willingness" in that context would be "formalistic in the extreme."

The school setting is decisive in these cases, just as it was decisive in the Ninth Circuit's decision. *See Newdow*, 328 F.3d at 487, 490. Although individual factual patterns differ among the Court's school-religion cases, the setting is immutable and ordains the outcome whether the challenged practice is a Regent's Prayer

(*Engel*); one of Alabama's successive school-prayer statutes (*Jaffree)*; teacher conscription of the "willing" to offer Scriptural readings in the classroom (*Schempp*); requiring passive display of the Decalogue on classroom walls (*Stone*); or procuring or permitting the injection of prayers into high school graduation exercises or sporting events (*Lee* and *Santa Fe*).[4] All of these diverse religious practices–not only prayer–are proscribed in the public schools precisely because they are public schools, even where the precise physical environment may be the civic center or football field rather than the classroom.[5] The setting

> places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion … [G]iven our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it … .

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4 *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

5 This is not only because we fear that young minds will be coerced, but also because of endorsement concerns. *See Santa Fe*, 530 U.S. 290. Because this Court has included "willingness" in its *certiorari* question, *amicus* here focuses on the meaning of that term even though endorsement concerns also argue for affirmance.

Lee, 505 U.S. at 593.

Petitioners and their *amici*, despite all these precedents which govern not only prayer but other religious adoptions, distinguish prayer from the compulsory affirmation of the Pledge. Through the "prayer is different" tactic they hope not only to rob *Engel*, *Schempp*, *Lee* and *Santa Fe* of controlling force by divorcing their prayer-specific facts from their rationales, but also to evade the command of another school case (because it did not involve prayer but a pledge of allegiance), *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).[6] If only prayer is proscribed by this

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[6] This is a startling turnabout for various of Petitioners' *amici*. For a decade, several organizations filing briefs for Petitioners here have defended insertion of prayer into school-sponsored activities, contending that such prayer in no way differs from other religious speech or speech that is merely "about" religion. *Of course* prayer is "different." Legal pronouncements that prayer is the same as any other religious speech defy common sense, and, for religious people who pray, cheapen prayer. This Court was correct in affirming the principle that "the nature of ... prayer has always been religious." *Engel*, 370 U.S. at 424-25. *See also Karen B. v. Treen*, 653 F.3d 897, 901 (5th Cir.), *aff'd mem.*, 455 U.S. 913 (1982) (prayer, as uniquely supplicatory, is a distinct genre). In fact, the Court would do a great service if it reminded lower courts that prayer *is* "different" than other religious speech or speech "about" religion or religious figures–and thereby curtail machinations to develop "student-initiated policies" of the sort the school board sought to rationalize in *Santa Fe*. A reminder would embargo the importation of public forum standards into the captive-audience setting on the dubious justification that *Hamlet* requires a prince. *See Capitol Sq. Rev. Bd. v. Pinette*, 515 U.S. 753, 760 (1995). This case is not the

Court's holdings, so the reasoning goes, then cases that are not explicitly about prayer need not be considered.

Distinguishing prayer from compulsory utterance of the Pledge is simply a diversionary tactic. Precedents subsume principles and not merely holdings, unless they are plainly *sui generis*. The Court's school cases, including its school-prayer cases, are cases of transcendent principle, not "redheaded Walpole" cases. The "prayer is different" argument simply avoids the question in this case.

Barnette is of central importance.[7] It is, in the doctrinal lexicon, shorthand for rights of conscience, particularly in the school setting; for protecting minoritarian opinions, no matter how unpopular; for the judicial obligation to apply principles, no matter how unpopular; and for preventing the state from compelling

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appropriate one in which to reiterate the difference between school settings and public fora, and prayer and other speech. The importance of the prayer cases to this case is not whether prayer is at issue, but rather, the principles involved in all the prayer cases. Recognizing that prayer is "different" would not validate the Pledge in any event, since religious activities other than prayer are proscribed in the schools. Besides that, as explained here, *Barnette* is instructive for this case. It is the compulsory utterance in the school setting that matters, not whether the utterance is prayer.

[7] Although the Court granted *certiorari* here on the "Establishment Clause" question, and *Barnette* speaks generically to the First Amendment, the case involved Jehovah's Witnesses' contention that the flag was a "graven image" within the tenets of their beliefs, 319 U.S. at 629, and five of the Justices addressed the religion as well as the compelled-speech issue.

adherence to an orthodoxy it would prescribe.

Barnette, like any other opinion, can be distinguished on its facts, but this is merely an attempt to whittle it into a redheaded Walpole. The question is whether any principled distinction of *Barnette* may be made.

The Court has understood the irresistible allure of compulsory rites as preceptorial tools, writing in *Barnette*:

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a shortcut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the Church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance and respect: a bowed or barred head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one

> man's comfort and inspiration is another's jest and scorn.

319 U.S. at 632-33.

The Court went on to pronounce that the Pledge required "compulsion of students to declare a belief," *id.* at 631, and coerced them to "communicate by word and sign [their] acceptance of the political ideas it thus bespeaks." *Id.* at 633. *Barnette* made a global pronouncement about compulsory participation in the Pledge: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control." *Id.* at 642. The state exceeded constitutional limitations because "[t]he right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to *speak freely and the right to refrain from speaking at all*." 319 U.S. at 645 (Murphy, J., concurring) (emphasis added).

The insertion of the words "under God" into the Pledge more than a decade after *Barnette* can only render the compulsory affirmation more of a constitutional affront, and not only for Jehovah's Witnesses. It was not necessary to the decision in *Barnette* that the objections there were religiously based, as the Court explicitly stated:

> Nor does [the constitutionality of the compulsory flag salute and pledge] turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies [the Jehovah's

> Witness] appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

319 U.S. at 634-35.

Petitioners and their *amici* argue that *Barnette* does not proscribe a student's "willing" utterance, and assume that a "willing" utterance is one that is not enforced by penalties such as expulsion. (*See, e.g.*, Pet. Br. at 20-21.) *Barnette* unquestionably proscribes coercion of affirmations through punishments, *see* 319 U.S. at 630-31, but the existence of punishments was hardly the only ground of decision. State compulsion, not direct punishment for nonconformity, was the overriding issue: "[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether [the state] contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning." 319 U.S. at 633. The fact that the school board offered the Jehovah's Witnesses an alternative version of the rite so that they would not be expelled for refusing to engage in the group ritual did not cure the constitutional defect. *See* 319 U.S. at 627.

Barnette is suffused with the realization that "willingness" is an odd construct in a setting in which compulsory rites are structured into the school day. Moreover, in the many years since *Barnette*, this Court has recognized that it is not necessary that the state impose direct, tangible detriments on schoolchildren in order for an Establishment Clause violation to have occurred. *Lee* is an exegesis on why "willingness" cannot rationalize away state intrusion on the sphere of conscience: the state may not "persuade or compel a student to participate in a religious exercise," 505 U.S. at 599; the state may not "exact religious conformity from a student as the price of attending her own [noncompulsory] high school graduation," *id.* at 596; the argument that lack of penalty or direct coercion excuses an Establishment Clause violation in the school setting "lacks all persuasion" and is "formalistic in the extreme," *id.* at 593; the state may not "place public pressure, as well as peer pressure" on students to induce them to "stand as a group or, at least, maintain respectful silence" as a religious rite proceeds because such pressure, "though subtle and indirect, can be as real as any overt compulsion," and because, "given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signifies her own participation or approval of it." *Id.* at 593. *See also Engel*, 370 U.S. at 423-24 (direct coercion not necessary for Establishment Clause violation). Likewise, *Schempp*, *Jaffree*, and *Santa Fe* struck religious practices that were not enforced by punishments for noncompliance.

Finally, lack of direct coercion can never alone legitimate an Establishment Clause violation, because "an

Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytism, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval of others, would not adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community." *Allegheny County*, 492 U.S. at 627-28 (O'Connor, J., concurring) (internal citations omitted).[8] *Barnette* and the other school cases thus cannot be distinguished from this case on the issue of "willingness" or lack of punishments for refusal any more than they can be distinguished on the "prayer is different" rationale.

II. EVEN IF THIS COURT FAILS TO APPLY ITS SCHOOL PRECEDENTS, THERE IS NO PRINCIPLED BASIS FOR SUSTAINING THE PLEDGE.

Barnette and all of the school cases should control the outcome here if they are to be regarded as embodying "important principles of our government [rather than] as mere platitudes." *Barnette*, 319 U.S. at 637. *Amici* on both sides of the case believe that only by "disavowing" them and "reconstituting" Establishment Clause jurisprudence can a pledge that affirms theistic allegiance be found constitutional. (*See* Rutherford Institute Br. at 10.) Since the Pledge cannot be sustained under existing precedents,

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[8] *Amicus* does not believe that the "under God" language of the Pledge is subtle.

there are few remaining justifications for "invad[ing] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 642. Petitioners' several alternative arguments do not articulate a principled ground on which the Pledge can be upheld consistent with this Court's precedents.

First, Petitioners and their *amici* urge the Court to regard the Pledge with its "under God" appendage as trivial either because it is textually or temporally brief or because its recitation is ubiquitous. (*See* Pet. Br. at 27-29; Brief of *Amicus* U.S. Senators at 10; Br. of *Amicus* American Legion at 11-12.) Second, they urge the Court to ratify majoritarian religious preference in the name of national unity or patriotism even as they explicitly marry religiosity to patriotism. Most of all, they urge the Court to trivialize the issue through obfuscation, either by pronouncing a compulsory theistic affirmation by schoolchildren innocuous "ceremonial deism," the pedigree of which is not reason but "history,"or by finding a secular purpose when the text and legislative history plainly defy the existence of one, or by making a confused doctrinal stew of endorsement precedents by importing display cases into the school setting. Any of these proposed justifications flouts precedent.

As to temporal brevity, this Court has rejected the notion that the state has a constitutional "pass" on signaling its preference for piety wherever the exercise is of short duration. It is "no defense to urge that the religious practices... may be relatively minor encroachments on the First Amendment." *Schempp*, 374

U.S. at 224-25 (internal quotations omitted); *Lee*, 505 U.S. at 594 (intrusion of the prayer was "greater than the two minutes or so of time consumed"); *Jaffree*, 472 U.S. at 60 ("The importance of the [neutrality] principle does not permit us to treat [a one-minute prayer or prayer-substitute meditation] as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority.").

As to majoritarian preference, this Court has rejected the notion that 50 bishops or 50 state attorneys general may determine that, if public piety is the choice of a majority of the political community, that choice is to be enshrined as law. *See Lee*, 505 U.S. at 596 ("While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency"); *id.* at 593 (prayers may not be incorporated into commencement ceremony even if "many, if not most" students want them); *id.* at 592 ("What to most believers may seem like a reasonable request that the nonbeliever respect their religious practices may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."). The rights secured by the Establishment Clause "may not be submitted to vote, *Barnette*, 319 U.S. at 638, because "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Id.* at 638.

Barnette is again entitled to the last word on the judicial role in arresting the juggernaut of "majority rule,"

compulsory gestures of "national unity," and state overreaching under the rubric of patriotic exercise.[9] The Court was not insensible of the public opprobrium its decision in *Barnette* would meet, writing:

> This case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes... . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ

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9 It is worth mention that two Justices characterized a compulsory flag salute and pledge recitation as a test (loyalty) oath, a compulsion that "has always been abhorrent in the United States." 319 U.S. at 644 (Black and Douglas, JJ., concurring).

> as to things that touch the heart of the existing order.

319 U.S. at 641-42. *See also id.* at 640-41.

As to history and ubiquity, Petitioners rely on *Marsh v. Chambers*, 463 U.S. 783 (1983). (*See* Pet. Br. at 35-37.) *Marsh*, however, has been regarded by the Court itself as a "redheaded Walpole," having been distinguished as inapplicable outside its context. *See Lee*, 505 U.S. at 603 n.4 (Blackmun, J., concurring) (noting that of 31 Establishment Clause cases decided from 1971-92, only *Marsh* failed to apply the *Lemon* test); *Allegheny County*, 492 U.S. at 598 & n.52 (the legislative prayer in *Marsh* is permissible because, unlike National Day of Prayer proclamations, it does not exhort citizens to engage in religious conduct but rather, is confined to legislators); *id.* at 630 (O'Connor, J., concurring) (whatever *Marsh* may have said about the longevity of legislative prayer specifically, longevity alone cannot validate a practice that is at odds with the Establishment Clause).

Even if *Marsh* could be decoupled from the legislative-prayer context, it could not legitimate practices in the public schools that were "traditional" or "ubiquitous" at the precise time this Court decades ago struck them despite their pervasiveness. They were struck, despite ubiquity or longevity, because of our particular scruples about indoctrinating schoolchildren. Moreover, the Pledge has endured various incarnations, and was amended to include the phrase "under God" only 50 years ago; thus, unlike the legislative prayer in *Marsh*, it cannot claim to be an "unbroken practice" of "two centuries." *See*

Marsh, 463 U.S. at 795.[10]

If *Marsh* cannot be imported to the public schools, then Petitioners suggest that its close relation, "ceremonial deism," validates the Pledge. Individual Justices in concurrence or the Court in *dicta* have in five cases (three of them school cases) so suggested.[11] Regardless,

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[10] Since the actual history of the Pledge is unavailing (both because it fails to satisfy *Marsh* and because it belies a secular purpose), Petitioners resort to extrinsic historical sources, such as a reference to the Creator in the Declaration of Independence. However, this Court has specifically rejected the idea that the Establishment Clause can be "interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic." *Allegheny County*, 492 U.S. at 598 & n.55 (citing *Jaffree*, 472 U.S. at 52). Given *Jaffree*'s holding, the word "God" can be substituted for "Christianity." *See also Schempp*, 374 U.S. at 241 (Brennan, J., concurring) (Court's "use of history" from the founding era must be limited to "broad purposes, not specific practices").

[11] *See Allegheny County*, 492 U.S. at 602-03; *Lynch*, 465 U.S. at 676 (O'Connor, J., concurring); *Jaffree*, 472 U.S. at 78 n.5 (O'Connor, J., concurring); *Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring); *Engel*, 370 U.S. at 435. Even so, if "ceremonial deism" could legitimate a compulsory affirmation, then posting the Ten Commandments in schools–which this Court has forbidden–could be so legitimated. "Ceremonial deism," if it is a rationale that should ever be applied (and atheists obviously think not) should at least be reserved for passive transfer of currency with "In God We Trust" stamped on it. This Court has suggested that there may be a distinction between gestures that require citizen participation, such as a National Day of Prayer, and those that do not. *See* 492 U.S. at 598 & n.52. Such a distinction in the school setting could not be reconciled with *Stone*.

constitutionally sanctioned "ceremonial deism" cannot be reconciled with the Court's holdings that the state may not favor religion over irreligion. It is either obtuse or an act of palatable obfuscation, if we believe that words have meaning, to pretend that an affirmation that the nation exists "under God" does not favor believers over nonbelievers. (*See* Br. of *Amicus* Rutherford Inst. at 9.) The inconsistency of "ceremonial deism" with precedents such as *Jaffree* provokes the question of what the Court actually means by its "ceremonial deism" *dicta*. If what the Court means is that some constitutional violations are deemed *de minimis*, that, too, renders its precedents to the contrary meaningless.[12] It is likewise willfully blind to ignore that the ostensible tool of national unity, which divides citizens along religious lines, does make religion relevant to a schoolchild's standing in the political community, even if the Pledge is rationalized as "ceremonial deism." If the Court sustains the Pledge, the atheist's "jest and scorn," it vitiates its precedents.

Finally, since no other rationalization withstands principled scrutiny, Petitioners and their *amici* resort to Orwellian sophistry on the secular purpose inquiry. They argue that the secular purpose demanded by *Lemon* is served by the plainly religious words "under God," that

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12 *See infra* at 19-20. Justice Brennan, in his *Schempp* concurrence, indicated that the Pledge's affirmation "may" be merely ceremonial deism, 374 U.S. at 303-04, but Brennan noted that one reason to reject a *de minimis* rationalization is that a practice can hardly be considered unimportant if its abandonment would provoke "intense opposition." *Id.* at 303.

secular purpose being making clear that the nation "was founded by persons who believed in God and believed the nation's growth and development was tied to God." (Pet. Br. at 27.)[13] They argue that the legislative history bespeaking religious motivation proves this "secular purpose" (*id.* at 27-28); that a report of the Legislative Research Service concluding that the phrase "under God" modifies the phrase "one nation" and hence is consistent with secular purpose because the addition was merely "intended to affirm that the United States was founded upon a fundamental belief in God, and not, therefore "intended to promote a belief in God" secularizes the Pledge (Pet. Br. at 28); that the religious language of the Pledge is merely patriotic because it was appended as "an acknowledgment of the fundamental importance of faith [and therefore] simply a recognition of what it means to be an American" (Br. of U.S. Senators at 16); and contend that the 1954 insertion of "under God" has a secular purpose because it is religiously motivated. (*See* Br. of United States at 36-37.) Indeed, *amicus* American Legion purports to find a secular purpose in the very fact that

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13 The "founded under God" justification of Petitioners' and their *amici* is drawn from Justice Brennan's *Schempp* concurrence. *See* 374 U.S. at 304 ("The reference to divinity in the revised [post-*Barnette*] pledge of allegiance . . . *may* merely recognize the historical fact that our Nation was believed to have been founded "under God.'") (Emphasis added). *But see supra* note 12 (noting some inconsistencies in the various observations made in that concurrence). Justice Brennan's overall view of what the Establishment Clause requires, however, is neither tentative ("may") nor equivocal.

"Congress' addition of 'under God'. . . distinguish[ed] the United States–a religious nation – … from its communist political adversaries." (Br. of *Amicus* American Legion at 9.) The Senators' *amicus* brief makes the same argument. (*See* Br. of U.S. Senators at 4 (quoting S. Rep. No. 83-1287 (1954) ("under God" was added to "illuminate a key distinction between our government and those of Communist nations," whom 1954 legislators termed "spiritually bankrupt").) Petitioners' and *amici*'s argument, by any uncontorted reading, admits that the addition of the words "under God" were not only religiously motivated, but were also plainly crafted to communicate a message of governmental disapproval of atheism, proscribed by this Court. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

The affirmation "under God" speaks for itself even without Petitioners' acknowledgment that it is religious. The contention that a religious purpose is secular makes casuistry seem the highest form of reasoning by comparison. Even if the Pledge could be said to serve a secular purpose that has surface credibility, such as fostering national unity or inculcating patriotism, it served these purposes *before* the words "under God" were added. This Court has been very clear about choice of means to achieve ends. "Where the government's secular message can be conveyed by two [means], only one of which conveys a religious meaning, an observer might reasonably infer from the fact that the government has chosen to use the religious [means] that the government [intends] to promote religious faith." *Allegheny County*, 492 U.S. at 618 (citing *Schempp*, 374 U.S. at 295 (Brennan, J.,

concurring)).[14]

The last conceivable ground on which this Court could sustain compulsory classroom recitation of the Pledge is to proclaim that it simply is not an endorsement of religion as measured against its precedents, even if the quantum of offense necessary to state an endorsement has not been specified except to say that a "reasonable observer" measures it.[15] On this point, Petitioners and their *amici* offer even more curious and illogical reasoning. They equate verbal, compulsory schoolhouse affirmations with public displays in which religious symbols' messages are diluted by their proximity to reindeer. (*See, e.g.*, Br. of *Amicus* American Legion at 10.) The importation of public-forum display standards into the school setting is problematic of itself, but the argument grows even more attenuated as Petitioners attempt to actually apply the

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[14] Relatedly, and equally bizarrely, *amicus* United States Senators even purport to discern a secular purpose in the fact that, after the Ninth Circuit issued its ruling, Congress "re-legislated" the 1954 language of the Pledge. The Senators then note, without irony, that this legislative gesture is eerily similar to the amendatory machinations of the Alabama Legislature after the defects of its "voluntary prayer" statute were exposed as *Jaffree* progressed through the courts. (*See* Br. of United States Senators at 16-17.) The parallel hardly commends the existence of a secular purpose.

[15] The Court has disagreed internally about the credentials of the reasonable observer, provoking Justice Scalia to observe that the malleability of the construct is "invited chaos." *See Pinette*, 515 U.S. at 768 n.3.

display cases' reindeer-to-creche formula to a textual analysis of the Pledge. Lost in the esoterica is what impression a schoolchild would reasonably form.

Petitioners and various *amici* contend that as a matter of grammar, schoolchildren reciting the Pledge swear allegiance only to the flag and the Republic, and not to God in particular, because the references to the flag and the Republic appear in "the beginning of the Pledge." (*See, e.g.,* Pet. Br. at 27-28; Br. of United States at 39-40.) The references to God in "the second half of the Pledge," as a grammatical matter, are "merely descriptive"–albeit descriptive of the founding of the nation "by persons who believed in God." (Pet. Br. at 27.) Accordingly, they contend that there can be no religious endorsement in the affirmation. The argument is spurious. While this Court has demanded a contextual inquiry in Establishment Clause cases, this has never extended to diagramming sentences. Diagramming sentences cannot tell us whether compelling schoolchildren to recite a Pledge affirming that the nation exists "under God" is constitutional.

Petitioners' arguments for secular purpose and nonendorsement dissemble, conflate discrete tests, and amuse with their novelty all at once. In order to avoid an endorsement problem while adopting Petitioners' argument, the Court would have to assume that schoolchildren are hermeneutics scholars or have perhaps studied deconstruction of texts with Jacques Derrida. Whatever various Justices may believe a reasonable observer to be, certainly *Lee*'s "reasonable dissenter in this milieu" cannot be expected to possess such an abstruse and recondite knowledge as to enable him to divine a hidden

meaning from a text that is facially plain.

CONCLUSION

"[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Barnette*, 319 U.S. at 642. No rationalization, be it shunning precedent and principle in order to embrace desired results, or finding a practice that violates those precedents and principles innocuous because the majority prefers the practice, or "ceremonial deism" that is neutral only in that it offends both the devout and the irreligious alike, the former by pronouncing religious affirmations so common as to be devoid of religious meaning and the latter by ordaining manifestly religious practices, or protestations that rote is only rote and the exercise is brief, or appeals to American or legislative history, or a convoluted attempt at textual deconstruction, suffices to rebut the truth embodied in those words, which have echoed from *Barnette* forward. This Court has set the constitutional polestar, and must be guided by it in this case.

Respectfully submitted,

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